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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF HAZELTINE RESEARCH IN RESPONSE TO ZENITH REPLY BRIEF

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REPLY BRIEF OF HAZELTINE RESEARCH IN RESPONSE TO ZENITH REPLY BRIEF

The reply brief filed by petitioner Zenith asserts a number of new contentions and cases, which should have been raised, if at all, as part of Zenith's main brief. Zenith has also re-tailored a number of its old arguments into a new form. We believe it would be helpful to answer these new matters now, rather than to attempt to do so in the time available for oral argument.

Zenith's reply brief also suggests a degree of complication which does not exist. The plain facts are: (a) the original Canadian award was based on Zenith's contention that the conduct of the Canadian patent pool for many years prior to and during the four-year damage period had interfered with Zenith's development of a market, sales and profits; (b) Zenith's damage claim therefore included the

profits it would have realized had it entered the four-year period with a mature or fully established market (a 16% share as to television and 13% share as to radio instead of its actual market share of 3% and 4% respectively); (c) this Court ruled in its previous opinion that a portion of the award was "necessarily" based on pre-damage period conduct; (d) on remand the Court of Appeals decided that the statute of limitations and the 1957 releases barred Zenith from recovery of those damages resulting from pre-damage period conduct; and (e) the Court of Appeals therefore ordered a remand so that there might be an award excluding damages based on pre-damage period conduct and limited to the damages suffered by Zenith resulting from the operation of the Canadian patent pool during the damage period.

I. ZENITH'S PROPOSED DEFINITION OF "ACCRUAL" OF A CAUSE OF ACTION UNDER SECTION 4B OF THE CLAYTON ACT WOULD CONSTITUTE A DETRIMENT TO THE ENFORCEMENT OF THE TREBLE DAMAGE REMEDY.

The substance of Zenith's contention is that—irrespective of when the plaintiff's rights are invaded by illegal damage-causing conduct which will also inevitably result in future lost profits—the plaintiff's cause of action for such lost profits does not accrue until after the time has expired during which the lost profits would have otherwise been realized (Z. Rep. Br. 4-17).[1] Zenith makes this contention with the hope of rescuing the millions of dollars obviously included in the original award as to Canada of almost $19

1. In this brief we use the same abbreviations as set forth at footnote 1, page 2 of HRI's answering brief. In addition, we refer to Zenith's reply brief as "Z.Rep.Br." and to HRI's answering brief as "HRI Br." Where emphasis appears in quotations in this brief, it has been supplied by us unless otherwise indicated.

million which, as this Court pointed out, included damages which were "necessarily" based on Canadian pool conduct occurring prior to the four-year statutory period (AA. 16; 395 U.S. at 116-17).

Zenith first seeks to create an argument out of the fact that the consistent line of decisions relied upon by the court below were, with one exception, before the enactment or effective date of the federal statute of limitations providing a uniform four-year period (15 U.S.C. 15b). Zenith contends that since most of the cases relied upon by the court below apply state statutes of limitations, the ruling in those cases that a cause of action accrues upon the occurrence of the damage-causing illegal conduct is "not determinative or even persuasive" (Z. Rep. Br. 6). This argument has no merit and Zenith did not even raise the point in its main brief or petition for certiorari.[2]

In the first place, although a number of the cases cited did involve state statutes of limitations, it is clearly established that the determination of when the cause of action accrued was a matter for federal law. As Judge Wyzanski pointed out in *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996, 1006 (D.C. Mass. 1942):

> "[I]n determining when this plaintiff's causes of action accrued, the law which governs is the law of the United States which gives the private right to sue for damages suffered from violations of the antitrust laws. On this point Massachusetts or Oklahoma law is not controlling."

See also *Muskin Shoe Co.* v. *United Shoe Machinery Corp.*, 167 F. Supp. 106, 109-11 (D.Md. 1958); *Hanover Shoe, Inc.*

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2. This contention is particularly difficult to understand since the *Hanover* case and the *Delta Theaters* case cited by Zenith (Z. Rep. Br. 9, 14) involved the application of state statutes of limitations.

v. *United Shoe Machinery Corp.*, 245 F. Supp. 258, 294-95 (M.D. Pa. 1965), *aff'd*, 377 F.2d 776 (3rd Cir. 1967), *aff'd*, 392 U.S. 481 (1968); *Sandidge* v. *Rogers*, 167 F. Supp. 553, 556 (S.D. Ind. 1958).

Secondly, it is a well established principle of statutory construction that the Congress in adopting legislation using certain terms is presumed to be aware of prior judicial construction of those terms.[3] Thus, when it adopted the present statute of limitations (for the purpose of establishing a uniform period of limitations) which bars all actions not commenced within four years "after the cause of action accrued," Congress must be presumed to have done so in light of the consistent prior holdings of the federal courts as to when such a cause of action accrues.

Thirdly, contrary to Zenith's assertion, there are a number of cases specifically applying the federal statute of limitations which have followed exactly the same rule as the Court of Appeals below with respect to the time of the accrual of the cause of action. See, *e.g.*, *Laitram Corp.* v. *Deepsouth Packing Co.*, 279 F.Supp. 883, 887-88 (E.D. La. 1968); *Sherman* v. *Goerlich's, Inc.*, 238 F.Supp. 728, 730 (E.D. Mich. 1963), *aff'd*, 341 F.2d 988 (6th Cir. 1965); *Fleischer* v. *A.A.P., Inc.*, 180 F.Supp. 717, 723-24 (S.D.N.Y. 1959); *Garelick* v. *Goerlich's, Inc.*, 323 F.2d 854, 855-56 (6th Cir. 1963); *Peto* v. *Madison Square Garden Corp.*, 384 F.2d 682, 683 (2d Cir. 1967). These cases not only involve the federal statute of limitations, but they cite and rely upon the leading cases cited by the Court of Appeals below.

Zenith's other attempts (Z. Rep. Br. 12-13) to distinguish

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3. United States v. Ryan, 284 U.S. 167, 174-75 (1931); Shapiro v. United States, 335 U.S. 1, 7, 20 (1948), *reh. den.*, 335 U.S. 836 (1948); Sherman v. Hamilton, 295 F.2d 516, 522 (1st Cir. 1961), *cert. den.*, 369 U.S. 820 (1962).

the cases cited by the court below and in our brief are equally without merit. The purported distinctions do not affect the applicability of the decided cases. In fact, all of the Courts of Appeals which have considered the issue have come to the same ultimate conclusion: the continued suffering of damages *from past conduct* does not toll the statute of limitations or create a new limitations period; instead, the cause of action *accrues* and the limitations period runs from the time of the invasion of plaintiff's rights, as to both past and future damages flowing from such invasion (HRI Br. 35-38, 40-42).

Also new is Zenith's reliance upon *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F.2d 725 (8th Cir. 1964), and district court decisions in Louisiana and New Jersey. Although Zenith now asserts that the decision below is "directly contrary" to the *Highland Supply* decision (Z. Rep. Br. 14) and that the district court decisions it cites are better reasoned (Z. Rep. Br. 13, 15), it did not mention any of these cases in its petition for certiorari or its main brief. Moreover, the *Highland Supply* case is not in conflict with the decision of the court below, and the district court opinions which Zenith cites, if construed as urged by Zenith, at best represent a distinct minority view not followed by any Court of Appeals or any other district court (see pp. 7-8 *infra.*).

The *Highland Supply* case involved a motion to dismiss the complaint. The complaint claimed damages for the "effects of (Reynolds') *acquisition and subsequent actions*" including alleged price fixing (327 F.2d at 727; emphasis by the court). The district court had dismissed the complaint with prejudice because the acquisition and the *first* price fixing had occurred more than four years prior to bringing the complaint. The Court of Appeals reversed on

the ground that the complaint revealed the possibility of invasions of rights within the limitations period, saying:

> "Irrespective of the date of 'acquirement' of Arrow by Reynolds, or the *first* 'price-fixing' date as considered by the District Court, we must rule that the instant complaint reveals facts as to abuse of 'monopoly power' which under proper showing, *injury and damage* to appellant's business might possibly be established *within* the limitation period. . ." (327 F.2d at 732).

While the court did say that the cause of action arises when the "damage" occurs, the remainder of the opinion makes it clear that the court was referring to injury or damaging impact and was *not* saying that a new cause of action arises each day merely because the plaintiff continues to suffer "damages." In fact, the court in *Highland Supply* not only applied the same rule as the Court of Appeals here, but cited with approval the same cases which were cited by the Seventh Circuit here, *i.e., Momand* (First Circuit), *Crummer* (Fifth Circuit), and *Steiner* (Ninth Circuit):

> "It is existence of monopoly power and the *exertion thereof* on the business of a competitor, in a relevant market, that gives rise to such a claim. Lawlor v. National Screen Service Corp., 238 F.2d 59 (3 Cir. 1956). Such right of action may arise from day to day. Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956) and cases there cited. It is well settled that where a private cause of action under the antitrust law is based upon a *continuous invasion* of one's rights, his cause of action accrues from day to day *as his rights are invaded to his damage.* Momand v. Universal Film Exchanges, 43 F.Supp. 996, 1006 (D.C. Mass. 1942), aff'd 172 F.2d 37 (1 Cir. 1948), cert. den. 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118 (1948); Crummer Co. v. du Pont, 223 F.2d 238 (5 Cir. 1955)" (327 F.2d at 732).

Thus, the court reversed and remanded so that there could be a determination of whether the exertion of monop-

oly power and price fixing by defendant had occurred during the four year period. It did *not* hold that a plaintiff could recover damages suffered in the damage period as a result of alleged antitrust violations occurring more than four years prior to the filing of the complaint.

Two of the district court decisions upon which Zenith now relies are decisions by the same judge in the Eastern District of Louisiana, *Delta Theaters* v. *Paramount Pictures,* 158 F.Supp. 644 (E.D. La. 1958) and *Streiffer* v. *Seafarers Sea Chest Corp.,* 162 F.Supp. 602 (E.D. La. 1958). To the extent that this district judge may be said to have held, as a general proposition, that a new period of limitations starts to run each day damages are suffered, his decisions are inconsistent with the holding of the court of appeals for that very circuit, as made clear in a later decision by another judge in that same district, *Laitram Corp.* v. *Deepsouth Packing Co.,* 279 F.Supp. 883, 887-89 (E.D. La. 1968).

In *Laitram,* the court commented that:

> "The Court of Appeals for the Fifth Circuit apparently has rejected the view that the statute runs on each day's damage as it occurs without regard to when the act causing damage was committed. In Crummer Company v. du Pont, 5 Cir., 1955, 223 F.2d 238, the court said that it was in full agreement with the appellees' theory that '* * * while successive claims would arise out of successive unlawful acts and consequent damages, such claims would have to do, and be concerned with only such successive occurrences and the damages and injuries caused by such acts, and such occurrences would not extend the period of limitation as to earlier acts done and injuries caused thereby' " (279 F.Supp. at 888-89).

The other district court case relied upon by Zenith was *Schenley Industries, Inc.* v. *N.J. Wine & Spirit Wholesalers*

Assoc., 272 F.Supp. 872 (D. N.J. 1967), where the district court said that a plaintiff could recover damages even though caused by acts occurring prior to the period of limitations. However, this comment—actually a dictum because the court held that the motion to strike would in any event have to be denied on other grounds—was made in reliance on the opinion in *Delta Theaters* v. *Paramount Pictures*, despite the fact that *Delta Theaters*, if so construed, is in conflict with the rule laid down by the court of appeals in its own circuit.

In addition, to the extent that these district court cases hold that the statute starts anew each day damages are suffered, they ignore the express language of the statute. This was made clear in the *Laitram* case. Sustaining a statute of limitations defense, the court pointed out that to permit recovery of all damages occurring within four years of the filing of suit, irrespective of when the illegal conduct took place, would "require distortion of the statutory requirement that the action must be commenced within four years after the cause of action *accrued*" (279 F.Supp. at 889; emphasis by the court). Continuing, the court said:

> "These words might be ambiguous to the layman; they should speak with absolute clarity to the lawyer: they require that any suit be commenced within four years after it might first have been brought because that is when the cause of action 'accrued' " (279 F. Supp. at 889).

Zenith also persists in its incorrect interpretation of the *Hanover* case (Z. Rep. Br. 9-11). As we previously pointed out (HRI Br. 39-40), *Hanover* involved recovery of damages suffered by reason of overcharges made during the relevant damage period (1939-1955 by reason of tolling) resulting from continuation of United's illegal lease-only practices. This Court held that failure to sue earlier for

the overcharges made prior to the period did not bar the recovery currently sought based on the overcharges *made within the current period of limitations* (329 U.S. at 502).

Zenith asserts that in *Hanover* this Court's opinion involved recovery for "the 'accumulating' harm" which was "the result in part at least of illegal activity by United prior to the damage period" (Z. Rep. Br. 10), thus insinuating that this Court approved an award based in part on pre-limitations acts. This contention is completely unfounded, as indicated by this Court's comment that:

> "Our conclusion is that Hanover proved *injury and* the amount of its *damages* for the purposes of its treble-damage suit when it proved that United had *overcharged* it *during the damage period* and showed *the amount* of the overcharge" (392 U.S. at 494).

Zenith misreads the Third Circuit's opinion when it asserts that the "argument relied on by the court below was termed an 'affront to reason' in the supplemental opinion" of the Third Circuit in *Hanover* (Z.Rep.Br. 9). A reading of the entire paragraph, of which Zenith quotes only a part, makes it clear that the "affront to reason" was the notion that the failure to sue earlier would bar *all* subsequent actions, even one based upon illegal conduct within the statutory period:

> "The rule applicable to the facts in this case is that where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover *for the separate invasion of its rights which occurred within the period.* Indeed, any other rule would be an *affront to reason,* for it would require the conclusion that injury and damages which were inflicted, as in this case, in 1955, by *concrete and specific business transactions,* were

> barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical *conduct*" (377 F.2d at 795).

Thus, the Third Circuit, as the Seventh Circuit in the instant case, *distinguished* between "invasion of rights" which occurred "outside the period" and such invasions which "occurred within the period."

Zenith bases its contention that the cause of action does not accrue at the time of the illegal conduct upon the erroneous argument that a treble damage plaintiff can never sue for future damages flowing from past conduct. However, none of the four cases which Zenith cites (the latter three for the first time) supports Zenith's contention (Z. Rep. Br. 9). In fact, the courts in each of those cases stated exactly the opposite. In *Connecticut Importing Co.* v. *Frankfort Distilleries,* 101 F.2d 79, 81 (2d Cir. 1939), the court held that recovery could not be based on future *acts,* saying "[d]amages which accrue after the suit is brought cannot be recovered in the action *unless they are the result of acts done before the suit was commenced*" (101 F.2d at 81).

In *Lawlor* v. *Loewe,* 235 U.S. 522, 536 (1915), which we had previously cited (HRI Br. 41), Mr. Justice Holmes very clearly stated that the plaintiff *can* recover future damages incurred subsequent to the filing of his action if those damages "were the consequence of acts done before and constituting part of the cause of action declared on" (235 U.S. at 536).

Flintkote Co. v. *Lysfjord,* 246 F.2d 368, 396 (9th Cir. 1957), *cert. denied,* 355 U.S. 835 (1957), held only that a treble damage plaintiff could not recover for damages resulting from wrongful *acts* committed subsequent to the filing of the complaint:

> "Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action; and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action. The time of the wrongful act controls the measure of damages" (246 F.2d at 394; emphasis by the court).

Volasco Products Co. v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 396 (6th Cir. 1962), cited as a "Cf" citation by Zenith, held that a plaintiff is entitled to recover future damages "proximately caused by the wrongful and illegal acts committed by the defendant before the complaint was filed."

Zenith also asserts that *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996 (D.C. Mass. 1942) (which we cited, HRI Br. 36, 40-41) "supports the position taken by petitioner here" (Z. Rep. Br. 13). Nothing could be further from the truth. In a situation where the plaintiff alleged continuous violations of the antitrust laws and invasions of plaintiff's rights right up to the filing of the complaint, the district court held that:

> "Each time the plaintiff's interest is invaded by an act of the defendants, he has a new cause of action. For that particular invasion he is at once entitled to recover as damages, *not only for the injuries he suffers at once, but also for those he will suffer in the future from that particular invasion*, including what he has suffered during and will suffer after the trial" (43 F.Supp. at 1006).

Zenith's "position" is *directly contrary* to the above ruling by Judge Wyzanski, and yet Zenith has the temerity to assert that *Momand* supports its position.

The doctrine Zenith now seeks to devise is also in *direct conflict* with well established principles of the law of damages. While future damages from past wrongs may not be based on speculation or "guesswork," a wronged plaintiff in tort, contract or other cases is not limited to past damages. He may also recover those future damages (including future profits) which he could with reasonable certainty anticipate suffering, subject to providing a reasonable basis for their computation.[4]

Zenith's position is not only incorrect on the basis of the decided cases, but, if adopted, it would constitute a major impediment to the effectiveness of the treble damage remedy. The adoption of such a doctrine would *limit* treble damage plaintiffs to recovery for past damages—it would *deprive* treble damage plaintiffs of the rights which other tort claimants have to sue for future damages reasonably anticipated to result from past wrongs—and thus it would require the treble damage plaintiff to sue *again and again*, year after year, for damages resulting from past acts. It is difficult to envision any suggestion *more detrimental* to the enforcement of the antitrust damage remedy or more likely to clog the federal courts with repeated litigation on the same subject matter.

The newly advanced assertion of "three things" which allegedly prevented Zenith's cause of action for the dam-

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4. See, *e.g.*, Palmer v. Connecticut Ry. Co., 311 U.S. 544, 559-562 (1941) (cases cited include Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563); Southwestern Brewery v. Schmidt, 226 U.S. 162, 169 (1912) (Op. Mr. Justice Holmes—damages "reasonably certain to be suffered in the future"); Pierce v. Tennessee Coal & Railroad Co., 173 U.S. 1, 16 (1899); A.H. Bull Steamship Co. v. Ligon, 285 F.2d 936, 938 (5th Cir. 1960); Moe Light, Inc. v. Foreman, 238 F.2d 817, 818 (6th Cir. 1956).

at issue here[5] from accruing in May, 1959 (Z. Rep.) is without merit: Contention No. 3 that the Canadian "had to be in operation during the time of the entire ıge period" is wrong on its face. The issue here is her in May 1959 Zenith could have sued for future ipated damages based on *prior* conduct. The subse- t existence or non-existence of the pool is totally irrele- to that issue.

nith's contentions that it *could not* sue for the four s' damages until June 1963 because (1) it must actually been in business or prepared to engage in business in ıda during the four-year period, and (2) it *had to have* S. profit comparison actually covering the four-year ɔd to prove damages, are similarly without basis. Zenith amply demonstrated by May 1959 by its entry into the ket in 1958 that it was prepared to engage in business anada (Finding XXX, A. 2905).[6] And Zenith's sugges- that a "comparable profit comparison" in the U.S. ring the damage period was the *only possible way* of ıating damages rings particularly false in view of th's repeated extreme assertions elsewhere in this liti-

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The only damages *at issue* here are the profits Zenith lost in amage period as a result of having been excluded or inter- with prior to May 22, 1959. The right of Zenith to collect amages it suffered in the period as a result of the pool's con- l operation *during* the period is not questioned and in fact is ssly recognized by the court below.

Zenith's references to this Court's opinion as to England and ralia (Z.Rep.Br. 6) are irrelevant. This Court pointed out that nly had Zenith not been in business in England and Australia any, many years, but its failure to enter the markets, either g or before the four-year period, was due to governmental ations and economic factors rather than patent pools (AA. ; 395 U.S. at 125-29).

gation as to liberality permitted in the proof of the amount of damages.[7]

Finally, Zenith concludes its section on the statute of limitations with highly inaccurate statements concerning a recent decision of the Seventh Circuit in *Baker* v. *F&F Investment Co.*, 420 F.2d 1191 (7th Cir. 1970), decided three months after the decision in the instant case, and participated in by two of the panel members in the instant case (Z.Rep.Br. 16-17). Zenith asserts that in *Baker* the Court of Appeals below "has since tacitly conceded its error" in the instant case, and that *Baker* "is in direct conflict with the decision of the court below . . . in its holding [in *Baker*] that damage causing acts outside the damage period, i.e., the execution of the installment contracts, can give rise to a suit for damages sustained within the damage period" (Z.Rep.Br. 16-17). This is a completely inaccurate representation of what the Seventh Circuit held in *Baker*.

In *Baker* the Seventh Circuit had before it an appeal from a district court decision which denied a motion to dismiss on the ground that some damage causing conduct occurred within the period of limitations, *i.e.*, the continued enforcement of the alleged "unlawful scheme" consisting of "efforts to collect on the contracts" and "actions instituted to evict [plaintiffs] from the homes they contracted to purchase" (300 F. Supp. at 220). In affirming, the Court of Appeals held that it was proper to deny the motion to dismiss because the complaint had alleged "wrongs" committed by defendants which occurred within the limitations period (420 F.2d at 1200), the court commenting that:

"[T]he touchstone of our inquiry must be the nature

7. In fact, Zenith had available in 1959 statistics concerning its experience during the first four years of its entry into the United States' television market (1949-52), which showed a market share ranging from about 5% to 6% (Offer of Proof, Para. V, A. 3564).

> and extent of defendants' behavior, not the duration of plaintiff's injury" (420 F.2d at 1200).

Thus, the Court there applied the exact same principle which it applied in the instant case.

Indeed, exactly contrary to Zenith's assertion that in *Baker* the Seventh Circuit "tacitly conceded its error" in the instant case, the decision in *Baker* is four-square with the decision below in the instant case. The court itself said:

> "As in Hazeltine Research, Inc. v. Zenith Radio Corporation, 418 F.2d 21 (7th Cir. 1969), the limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover 'for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-[limitation] periods acts occurring in the damage period' (418 F.2d at p. 25)" (420 F.2d at 1200).

The petition for certiorari in the *Baker* case was denied by this Court on October 12, 1970 (39 U.S.L.W. 3146).

The Court of Appeals was correct in determining in the instant case that Zenith is barred from recovering damages which it may have suffered during the damage period by reason of conduct of the Canadian pool occurring before the period of limitations. The cause of action for such damages had accrued before May 22, 1959, and thus is barred by 15 U.S.C. §15b. Zenith's right to recovery is limited to damages flowing from damage period conduct.

II. ZENITH'S ATTACK ON THE RELEASES HAS NO MERIT.

Zenith's reply brief at pages 17-26 attempts to blunt the effect of the September 1957 releases by several new or restated arguments:

(1) In sub-section (c) at pages 21-26, Zenith advances for the first time the erroneous contention that the releases given to RCA and others *did* reserve rights against HRI. Zenith's tortured reasoning is that the inclusion of parent and subsidiaries in the releases, as authorized by the settlement agreement (PX 48, A. 2783), somehow constituted a reservation of rights against alleged co-conspirators. The complete lack of merit in this argument is shown by the fact that Zenith's counsel in this litigation, who also acted on behalf of Zenith in the negotiations and signed the settlement agreement (PX 48, A. 2786) which led to the 1957 releases, expressly admitted in open court that HRI *is* entitled to the benefit of the releases, contending only that they do not apply to future damages:

> "The Court: What is your reply to his contention that the 1957 release also released Hazeltine from anything prior to the date of the release?
>
> "Mr. McConnell: Well, any money damages which had accrued prior to 1957, if they were joint tortfeasor, which we allege that they were, would be released, but we are not asking for damages prior to 19—
>
> "The Court: You have answered my question.
>
> "Mr. McConnell: But not in the future, and I have got a case squarely on that. There is no question about it at all. You cannot release torts which arise in the future. It is against public policy and it is void" (A. 3035).

In the face of this unequivocal admission by Zenith's attorney, Zenith cannot now in good faith argue that the release was intended to and did contain an express reservation of rights against HRI.

Moreover, the inclusion of parent and subsidiaries cannot be construed as an "express reservation" of rights against others. The *Twentieth Century-Fox* case, cited by

Zenith (Z. Rep. Br. 23-24) as "succinctly" stating the rule that "joint tortfeasors are released *unless* an express contrary intention is demonstrated" involved a release which, like the one here, extended to the releasee and "its past and present *parents, subsidiaries* and *affiliates*, predecessors, successors . . ." (351 F.2d at 927 n.1). Obviously that court did not consider this express inclusion of such related companies to be an expression of reservation of rights against others, for it held the release "incorporated no express reservations of any kind" and that the releasees' alleged co-conspirators *were* entitled to the benefit of the release (351 F.2d at 931).

In addition, there was an obvious reason for including parent and subsidiaries in the Zenith releases wholly unrelated to any claim based upon their being co-conspirators. The settlement agreement provided for a "general release." It thus included not only the claims in the litigation, but all claims generally which Zenith might have. Thus, although the parents and subsidiaries of RCA, GE and Western Electric would, if co-conspirators, have the benefit of a release of the claims in litigation even if not mentioned, in order to give them the benefit of a general release of all other claims, naturally they would have to be named.

Zenith's argument is an afterthought. Although HRI claimed the benefit of the releases in argument before the trial court on its motion to reopen the proofs and at all subsequent stages of this litigation, Zenith's new argument was never advanced in the district court, or in the briefs or arguments to the Court of Appeals on the appeal to that court. It was not asserted in the briefs or arguments to this Court during the original appeal, or in Zenith's briefs filed in the Court of Appeals prior to the Court of Appeals' most recent decision. No mention of it appeared in the petition for certiorari or in Zenith's reply brief on the petition for certiorari, and it was not asserted in Zenith's brief on the merits on this appeal. The fact that this point was not once

even mentioned but instead was raised for the very first time in the reply brief here shows that it was not only an afterthought but that it could not have been the intention of Zenith that the language of the settlement agreement or the releases constituted an express reservation of rights as to HRI. Had that been the case, it would have been the very *first* thing Zenith would have raised on the release question.

(2) The decision of the court below and HRI's argument on the release issue are based upon two fundamental propositions of federal law: (A) absent an express reservation of rights, a release of one co-conspirator releases all alleged co-conspirators; and (B) the release of future damages flowing from past acts deprives the person giving that release of the right to later sue for those future damages. Not being able to deny that the cases we cited stand for the propositions for which they are cited, Zenith now resorts to the argumentative technique of saying that the cases cited for proposition A do not support proposition B, and that the cases cited for proposition B do not support proposition A. Specifically, we cited *Twentieth Century-Fox, Dura Electric Lamp* and other cases for the rule uniformly applied by the federal courts in antitrust cases that the release of one alleged co-conspirator releases all in the absence of an express reservation of rights against others (HRI Br. 29). We cited certain other cases on page 24 of our brief in which releases, similar to the one given here, had applied to bar not only the damages up to the date of the release but also *future damages* resulting from conduct occurring prior to the release.[8] At pages 19-20 of its

8. There are two recently reported cases which similarly held that releases having language substantially identical to that of the releases involved here barred recovery of damages suffered after the release as a result of conduct prior to the release. Sears, Roebuck & Co. v. Jardel Co., 421 F.2d 1048, 1053 (3d Cir. 1970); Green v. Valve Corp. of America, 428 F.2d 342, 345 (7th Cir. 1970).

reply brief, Zenith says that the *Twentieth Century-Fox* and *Dura Electric Lamp* cases did not involve future damages and that the cases cited on page 24 of our brief did not involve the doctrine of release of joint tortfeasors. Zenith's response cannot alter the fact that the propositions relied upon by the Court of Appeals below are settled law in the federal courts.[9]

(3) As to Zenith's contention that the September 27, 1957 releases could not release future damages resulting from conduct prior to the releases because such a cause of action "did not even exist until petitioner sustained damages in the form of lost profits" (Z.Rep.Br. 18), the fact is that:

(a) a cause of action *does* exist for future damages which will result from past conduct (HRI Br. 40-42);

(b) even if it were to be assumed (incorrectly) that a cause of action for future damages resulting from past acts arises from time to time only as the calendar turns after the occurrence of the damaging conduct, nevertheless the releases would apply, for they specifically released all "causes of action" which Zenith "*hereafter can, shall or may have* for, upon or by reason of any *matter, cause or thing* whatsoever from the beginning of the world *to* the day of *the date* of these presents . . ." (HRI Br. 26-27, A. 3051-52); and

(c) if Zenith's contention were correct, Zenith could have sued RCA, GE and Western Electric in 1963 for

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9. Contrary to the impression Zenith apparently seeks to create (Z.Rep.Br. 25), this Court in Aro Manufacturing Co., 377 U.S. at 501, cited the rule of the Restatement of Torts that a general release of one alleged co-conspirator releases all in the absence of an express reservation of rights against others as representing the "overwhelming weight of scholarly authority."

> loss of profits during the 1959-1963 period resulting from a lack of market build up by reason of pool interference prior to September 1957, which would be directly contrary to the express language of the releases (HRI Br. 27).

In asserting the alternative theory that the release of future damages from past acts would be contrary to public policy, Zenith persists in attempting to obscure the difference between the release of a claim for damages based on *past conduct* and an attempted release of liability for *future conduct* constituting a violation of the antitrust laws. Zenith cites *Fox Midwest Theatres* v. *Means,* 221 F.2d 173 (8th Cir. 1955) (Z. Rep. Br. 19), in which the court said:

> "Any contractual provision which could be argued to absolve one party from liability *for future violations* of the antitrust statutes against another would to that extent be void as against public policy. . . . [T]he effect of such a release could be to *permit a restraint of trade to be engaged in . . .*" (221 F.2d at 180).

In other words, it would be against public policy to release the effects of *future conduct* because to do so would *authorize a future violation* of the Sherman Act. The 1957 releases cover only past, present and future damages resulting from *prior conduct* "to the day of the date of these presents." They do not release or purport to release any claims based on *conduct* in the future.

In fact, it is Zenith's contention which would be *against* public policy. To hold that a release could not include future damages anticipated to result from prior conduct, would often make it impossible to settle treble damage claims and thus result in increased litigation (HRI Br. 27).

III. ZENITH'S "WAIVER" ARGUMENTS ARE CONTRARY TO THE RECORD AND ITS OWN ADMISSIONS.

The substance of Zenith's various "waiver" arguments appearing at pages 27-32 of its reply brief, have been largely dealt with in our main brief (HRI Br. 49-57). Accordingly we will comment only briefly on some of Zenith's reply brief assertions.

Zenith asserts that at pages 51-55 of its brief HRI has taken a "new approach" with respect to the waiver issue (Z. Rep. Br. 28). At those pages we outlined the sequence of events whereby the trial court had granted leave to HRI to enter the pleas of limitations and release *prior to entry of judgment,* but erroneously rejected the defenses on the merits. These are precisely the same matters previously referred to as showing that these defenses are in the case (*e.g.,* HRI's Reply Brief On Antitrust Claim filed in the Court of Appeals on the first appeal, p. 14; and HRI's brief filed in this Court in opposition to Zenith's Petition for Mandamus, Misc. No. 1338, pp. 22-24).

Zenith refers to the trial court's statement that he did not intend to permit "a second chance" as though this had reference to the issue of filing of the affirmative defenses (Z. Rep. Br. 31). The statement quoted by Zenith (A. 3527) had nothing to do with filing of the affirmative defenses, but was made at the conclusion of the reopening hearings in connection with the damage award as to England and Australia, many months after the court's ruling with respect to limitations and release, and, indeed, after the Canadian aspect of the case was already on appeal.

Zenith asserts that the Court of Appeals "cavalierly disposed of" the waiver issue by concluding that the trial court's ruling as to release and limitations was on the

merits and not on the basis of waiver (Z. Rep. Br. 27). Yet three paragraphs later, Zenith agrees with the Court of Appeals that the decision of the trial court was on the merits, for it says:

> "[T]he *rejection* by the trial court of these defenses *on their merits* was a correct decision . . ." (Z. Rep. Br. 27).

In all its argument on the "waiver" issue, Zenith overlooks the fact that the trial court may in its discretion at any time before entry of judgment excuse a party from failure to plead an affirmative defense in its original answer (see HRI Br. 55-57), and ignores its own prior admission in this Court that the trial court did precisely that:

> "The trial court permitted the filing of the pleas as of a date a year after the trial (A. 3037), and then promptly overruled the motion to dismiss the counterclaim on these grounds (A. 3037)." (Zenith Reply Brief, October Term, 1968, p. 16).

IV. NEITHER ZENITH'S NEWLY ASSERTED "RELATION BACK" CONTENTION NOR TOLLING IS BEFORE THE COURT.

Before dealing specifically with Zenith's contentions with respect to tolling and relation back, it should be pointed out that neither tolling nor relation back would have any effect upon the release defense. No matter when the action was commenced or what the applicable limitations period is, Zenith is barred by the releases from recovering any damages which it suffered after September, 1957 by reason of conduct which occurred prior to September, 1957.

A. Relation Back.

In an attempt to expand the limitations period, Zenith's reply brief asserts a "relation back" argument (Z. Rep. Br.

36-38). Zenith states that the relation back argument was "made at page 35 of our main brief" (Z. Rep. Br. 38), but the fact is that although the argument was there hinted (see HRI Br. 45 n. 25), it first appears expressly in Zenith's reply brief. In any event, this issue is not before the Court.

No issue involving a claimed relation back to the date of the answer was listed in the "Questions Presented For Review" in Zenith's petition for certiorari (Z. Pet. 2-4). Nor does any such issue appear in the rephrased questions listed in Zenith's brief on the merits (Z. Br. 4-6). Under such circumstances the issue is not before the Court (Supreme Court Rule 40(d)(2)). Moreover, no such issue was argued to or decided by the Court of Appeals and has not been briefed by the parties here.

In addition, everything that Zenith has done in this case is inconsistent with its present assertion that the filing date of the counterclaim relates back to the date of the answer. First, in referring to this Court's footnote comment on relation back (Z. Rep. Br. 37), Zenith omits the first sentence of the footnote in which this Court stated that: "The record discloses that Zenith, HRI, and the courts below *all considered* the damage period to be the four years prior to the date on which Zenith filed its counterclaim" (AA. 8 n. 2; 395 U.S. at 108 n. 2). Having repeatedly asserted that the "damage period" was May 22, 1959 to June 1, 1963, Zenith cannot now in good faith assert that the damage period really extended back to April 7, 1956.

Second, to relate back the limitations period to April 1956, for the purpose of claiming damages based on conduct beginning at that time would be in direct conflict with Zenith's motion and sworn affidavit which constituted the basis on which Zenith was granted leave to file its counterclaim three years after its answer. For although the mo-

tion, Crotty affidavit and counterclaim made reference to paragraphs 12 and 13 of the answer, it was expressly stated that the matters or activities for which *treble damages* were claimed were those which had occurred since the filing of the answer (April 7, 1960) (A. 63, para. 2).[10]

Moreover, if the issue of relation back were before the Court, a host of questions would be raised which neither party has ever considered as part of this lawsuit,[11] and which, in fact, discredit Zenith's whole approach to the damage issue in this case. For example, how does Zenith square its contention that its answer filed in 1960 "was the equivalent of a treble damage counterclaim" (Z.Rep.Br. 37) so as to support its relation back argument, with its theory that the counterclaim in this case could not have been filed earlier than 1963? According to Zenith's theory, a treble damage plaintiff is limited to those damages which he has actually suffered at the time of the filing of his action. Thus, if the filing of Zenith's action (*i.e.*, its counterclaim) relates back to the date of the filing of the

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10. The earlier activities would be appropriately referred to in the counterclaim for the purposes of giving background, alleging the existence and character of the alleged conspiracy, and forming basis for injunctive relief, but the reliance on those activities as a basis for the damage claim was clearly negatived (see HRI Br. 44).

11. Neither Bull v. United States, 295 U.S. 247 (1935) nor Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231 (6th Cir. 1960) holds that an antitrust counterclaim, such as Zenith's counterclaim here, should relate back to any earlier answer. The Bull case dealt only with the special defense of recoupment, which by definition is based on a matter arising out of the transaction sued upon and therefore can never be barred if the main action is timely. In Cold Metal, a patent infringement counterclaim was held to relate back to the date of the declaratory judgment *complaint* specifically because both raised identical issues and sought identical relief—a situation not present here.

answer then, under Zenith's theory, Zenith would be limited to those damages which it suffered in the period prior to the filing of the answer in 1960.

Other equally perplexing questions would be presented if Zenith's attempt to salvage the $19 million damage award on the basis of relation back were properly before the Court. For example, if construed to relate a late-filed counterclaim back to the date of the answer so as to negate the statute of limitations, is Rule 15(c) beyond the rule making power of the courts? What is the relationship between Rule 13 which applies to counterclaims, and Rule 15 which applies to amendments in general?[12] All of these matters—which have not even been briefed by either party —are matters which would have to be considered if the question of relation back were before the Court.

B. Tolling.

By merely asserting that its main brief answered the "contentions" of the Court of Appeals (Z. Rep. Br. 43), Zenith leaves unanswered the factors listed in our brief indicating that the statute does *not* provide for tolling as to persons not named in the government case (HRI Br. 46-49). For example, Zenith has no answer to the fact that Congress, having knowledge of the uniform interpretation of the language of the statute limiting tolling to named parties in the government litigation, did not change that language when it amended other parts of the statute (HRI Br. 47-48). Such circumstances have repeatedly been held

12. In Stoner v. Terranella, 372 F.2d 89 (6th Cir. 1967), the court held that Rule 13 is mutually exclusive of Rule 15 and that therefore a counterclaim sought to be added to an answer did not relate back to the date of the answer under Rule 15(c) for purposes of avoiding the statute of limitations.

to indicate that Congress accepted the construction of the statute and intended that it be continued.[13]

We submit that if the law is to be changed to provide for tolling as to parties not named in government litigation, this should be a matter for the Congress, but that in any event the situation here does not present the issue.

V. ZENITH WOULD HAVE THIS COURT IGNORE THE AFFIRMATIVE DEFENSES REGARDLESS OF THEIR MERIT AND REINSTATE THE ORIGINAL JUDGMENT.

Sections II and III of Zenith's reply brief (Z. Rep. Br. 32-46) contain a variety of arguments ultimately aimed at convincing the Court that the original judgment of almost $19 million should be reinstated irrespective of the validity of any of the affirmative defenses.

Zenith's primary argument in section II (Z. Rep. Br. 32-40) and elsewhere in its reply brief (*e.g.*, pp. 11-12, 25-26) is that because a *part* of the Canadian damage award was considered to result from damage period conduct, *the entire amount* of the alleged damages should be awarded to Zenith irrespective of the defenses of release and limitations. This argument is purportedly based upon *Bigelow* (Z. Rep. Br.

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13. Missouri v. Ross, 299 U.S. 72, 75 (1936) (". . . Congress in the face of these decisions has permitted the clause as it now appears in paragraph (6) to stand for many years *without change in its phraseology*, although amending that portion of the Bankruptcy Act in other particulars. This is persuasive evidence of the adoption by that body of the judicial construction."); United States v. Ryan, 284 U.S. 167, 175 (1931); Stonybrook Tenants Association, Inc. v. Alpert, 194 F. Supp. 552, 555-56 (D. Conn. 1961); In the matter of John S. Goff, Inc., 141 F. Supp. 862, 864 (D. Me. 1955).

33-36), but *Bigelow* neither requires nor even suggests such a result.

As this Court commented in its first opinion (AA. 23-24; 395 U.S. at 123-24), the *Bigelow* case enunciated the principles that in treble damage cases, the defendant must bear the risk of uncertainty of proof, that the fact finder may make a "just and reasonable estimate of the damage *based on relevant data*", and that the wrongdoer may not complain that the amount of damages was not precisely established or based on more accurate data which his own misconduct has rendered unavailable (327 U.S. at 264-65). However, this is not a case of uncertainty as to whether or not the original Canadian damage award of $6 million (before trebling) was entirely attributable to damage period conduct. *This Court has already affirmatively held, and Zenith has admitted (Z. Rep. Br. 8), that a portion of that damage award was not due to damage period conduct. Rather, a portion was "shown to be attributable to other causes," namely to pre-damage period and pre-release period conduct*—indeed, a substantial portion because, as this Court pointed out (AA. 16, 395 U.S. at 116), the damage calculation assumed that Zenith but for the Canadian pool's operations prior to the beginning of the period, should have started with a *mature market* position of 16% of the Canadian television market and 13% of the radio market from the very first day of the period rather than its actual shares of 3% and 4%, respectively (see HRI Br. 18-22).

Zenith asserts that HRI has engaged in an "involved and 'metaphysical' argument" concerning the " 'mature market' concept" and that the courts below have found no merit in or refused to follow the concept (Z. Rep. Br. 32). In fact, the concept has been understood and adopted by the trial court (A. 3204), by the Court of Appeals, and by this Court

in its previous opinion (HRI Br. 18-22). Moreover, Zenith conceded that its claimed Canadian damages were calculated on the assumption of a "mature market position" (Z. Br. 25) and its executive vice president Kaplan so testified in this case (A. 3440, 3465). The simple point is that damages cannot be awarded on the basis of profits Zenith claims it would have made in the damage period if it had started the damage period with a 16% market share instead of a 3% market share, because the activities which prevented Zenith from having that market share at the beginning of the damage period occurred more than four years prior to the bringing of the counterclaim and before the releases. Thus, any cause of action based upon those activities was barred by the statute of limitations and the releases.

What Zenith continually seeks to ignore is that the question is *not* whether Zenith's damage evidence and the finding of the trial court are accurate estimates *of what they purport to estimate* (*i.e.*, a mature market share); the question is *whether they estimate the right thing* (HRI Br. 65-66). In fact, on this issue, Zenith repeatedly represents our position as something which it is not.[14]

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14. Zenith asserts that our brief detailed no "record facts" which "negative petitioner's damage computations" (Z. Rep. Br. 3) and again argues that Zenith's evidence on the issue of the amount of damages went in without objection (Z. Rep. Br. 35). Although the admissibility of Zenith's evidence was not objected to, there was substantial countervailing evidence both in the form of direct testimony and cross examination of Zenith's witnesses (see pp. 127-34 of HRI's main brief in the Court of Appeals dated December 21, 1966 and on file with the Clerk of this Court as part of the record on appeal). Moreover, in our briefs on this appeal we have not detailed the evidence in the record which negates Zenith's estimates and calculations as to the amount of damages because, as we have pointed out, the issue here is the correctness of the holding of the Court of Appeals on the statute of limitations and releases.

Our position is *not* that Zenith's damage calculations are erroneous because they merely "assume" a mature market (Z. Rep. Br. 38), nor is it our position that Zenith is foreclosed from recovery because it could not establish factually what a mature market position would have been in Canada (Z. Rep. Br. 35), and we certainly do not contend that the release and limitations defenses here go to the *weight* of Zenith's damage exhibit (Z. Rep. Br. 35). On the contrary, it is our position, and the holding of the Court of Appeals, that the defenses of release and limitations, as a matter of law, prevent the award of damages based upon a mature market position at the start of the damage period *in this particular case* because such a method of estimating damages necessarily includes recovery of damages proximately caused by alleged illegal conduct which occurred prior to the releases and prior to the period of limitations.

All that the Court of Appeals opinion requires is that, where there is alleged illegal conduct both outside the period of limitations and within the period of limitations, the trier of fact should take the conditions *as they actually exist* on the first day of the damage period and then determine, on the basis of available relevant data, the amount of profits the plaintiff would have made thereafter if there had been no illegal conduct after that date. In the instant case that would involve (a) starting with Zenith's actual market share in Canada at the beginning of the damage period (approximately 3% as to television and 4% as to radio) and (b) estimating, on the basis of available relevant data, what share of the market and what profits Zenith would have achieved during the four-year period assuming that no illegal patent pool conduct occurred during the

damage period[15] and (c) making deductions on account of Zenith's actual sales and profits.

Contrary to Zenith's assertions, this method of computing damages would not "destroy" the rights of Zenith or any other treble damage claimant to recover treble dam-

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15. While the question as to what market share Zenith could have obtained during the four-year period under these circumstances is not before this Court, two statements contained in Zenith's reply brief relating to Zenith's experience in Canada are so incorrect and so misleading that we believe they should not go unanswered. First, Zenith points out that it had the same share of the market in Canada in 1959 (3.1%) as in 1963 (3.2%) and asserts that this shows "that faced with pool restrictions Zenith could never improve its market position in Canada" (Z. Rep. Br. 32-33). In fact, Zenith's market share had increased to 4% by 1960, and to 5% by 1961, but dropped off in 1962 as the impact of an unfavorable exchange ratio and additional Canadian tariffs took effect (DX 220, A. 2661; PX 62, A. 2850). Zenith's annual reports for this period showed that having entered the market in 1958, Zenith had "doubled its sales" in 1959 and "achieved a substantial gain in its percentage of industry sales" (A. 2993); in 1960 Zenith "successfully countered the downward industry sales trend . . . and made important gains" (A. 2994); in 1961 Zenith made "gratifying progress during the year selling more television receivers than in the two previous years combined" (A. 2995), but in 1962 the "curbs instituted by the Canadian government" relating to "exchange ratio" and "additional tariffs" presented "serious obstacles" (A. 2850).

Secondly, Zenith asserts that its sales increased during the 1964-1967 period when the trial court injunction was in effect. This same assertion was first made in Zenith's brief in No. 49, October Term, 1968 (pp. 83-84; Appendix B, pp. A. 25-26). As pointed out in HRI's answering brief in No. 49, October Term 1968 (p. 120), the growth in sales volume largely represented Zenith's entry into the Canadian color television market in the 1960's at the same time as other competitors, and apparently the volume of radio and black and white television declined sharply *after* the injunction.

ages (Z. Rep. Br. 40); would not make "the treble damage liability of respondent immune from any effective relief" (Z. Rep. Br. 46); and would not limit recoverable damages to those allocable to "specific, concrete 'overt' acts" (Z. Rep. Br. 41-43). In fact, this is the very basis on which Zenith's witnesses purported to estimate damages for England and Australia, and the very basis on which the trial court purported to make its findings as to the amount of Zenith's damages with respect to those countries (HRI Br. 67-68).

VI. THE PUBLIC INTEREST DOES NOT REQUIRE THE AWARD OF $19 MILLION TO ZENITH.

Zenith closes its reply brief by asserting that HRI has been engaged in "the most flagrant forms of abuses" and in "deliberate and flagrantly illegal conduct," and by implying that the Canadian award of $18,892,173 should be given to Zenith, whether or not it is legally entitled to it (Z. Rep. Br. 45-46). Although this argument itself is not new and we have dealt with it in our main brief (pp. 68-75), the quotation of the testimony of counsel in 1962 was not in Zenith's earlier briefs on this appeal.

It should be obvious from the statements of counsel quoted by Zenith (Z. Rep. Br. 46) that he believed in good faith that the licensing practices of the Canadian pool limiting imports were required and were lawful.[16] Hazeltine Corporation had licensed its patents to the Canadian

16. Canadian law provides that Canadian patents are abused and may be subject to being revoked if licensed to non-Canadian manufacturers to such extent that imports will interfere with the ability of local manufacturers to engage in production reasonably sufficient to supply Canadian demand. See *e.g.*, HRI main brief in No. 49, October Term, 1968, of this Court, pp. 152-54. The cases cited by Zenith as supposedly giving notice that the Canadian pool was unlawful (Z. Rep. Br. 46 n. 4) involved consent judgments, without an adjudication as to whether or not the Canadian pool was unlawful.

pool but was not a member. Neither HRI nor its parent Hazeltine Corporation manufactures radio or television sets, and neither competes with Zenith. There is no way in which the damage to Zenith alleged here could benefit either HRI or Hazeltine Corporation. The sole means Hazeltine Corporation had to benefit from its Canadian patents was through royalties, and neither company would benefit from a restriction on the grant of licenses under those patents. The charges of intentionally illegal conduct thus have no basis in fact.

This Court pointed out (AA. 14; 395 U.S. at 114) that the proof of the *fact* of damage itself was "by no means conclusive" but only established inferentially. The testimony of the same witnesses on whom Zenith relies as to Canada was the purported basis for Zenith's attempt to recover almost $30 million in treble damages as to England and Australia when in fact it had suffered *no* injury with respect to those countries. Under such circumstances, Zenith's contention that it should be granted $19 million on the basis of the public interest rings hollow. Use of the treble damage remedy as a means of antitrust enforcement does not call for the award to a giant of the industry of millions of dollars which the *record shows* it is not lawfully entitled to.

Zenith's suggestion that the litigation must come to an end because it "has been in progress for over eleven years" (Z. Rep. Br. 45), as well as its "public interest" arguments, are in substance the same arguments which it made in opposing all efforts to reopen the original English and Australian awards, which were ultimately found to be completely without basis in fact. Moreover, Zenith has its injunction, and having to wait for its money until the *proper* amount of its damages are determined will certainly cause no injury to Zenith. Indeed, to do otherwise would be contrary to the interests of justice.

CONCLUSION

For the reasons given in our main brief and this reply brief we respectfully submit that the ends of justice require that the judgment of the Court of Appeals be affirmed so that the case may go back to the trial court for a determination of the amount which HRI owes Zenith.

Respectfully submitted,

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